

MAINE STATE HARNESS RACING COMMISSION
MINUTES OF MEETING
JUNE 24, 2016

Conference Room, Gambling Control Board
Department of Public Safety
45 Commerce Drive, Augusta, ME

Commission Members Present: William Varney, Chair, Gary Reed, William McFarland and Michael Graham

Commission Member Absent: Alex Willette

Staff Members Present: Ron Guay, AAG, Henry Jennings, Carol Gauthier and Miles Greenleaf

1. Call the Meeting to Order and Introductions: William Varney, Chair

2. Review and Approval of Written Decisions and Orders

Commissioner Varney appointed Commissioner McFarland chairman pro tem for Valerie Grondin's decision and orders. Commissioner McFarland asked for a motion on Decision and Order 079 and 087. Commissioner Reed made a motion to approve the Decision and Order for Valerie Grondin's complaint number 2015 MSHRC 079 and 087 as presented. Commissioner Graham seconded. Vote 3-0.

Commissioner McFarland made a motion to approve the Decision and Order for Stanley Whittemore complaint number 2015 MSHRC 072 as presented. Commissioner Reed seconded. Vote 4-0.

Commissioner Reed made a motion to approve the Decision and Order 2015 MSHRC 075 for Robert Gray as presented. Commissioner McFarland seconded. Vote 4-0.

Commissioner Graham made a motion to approve the Decision and Order 2015 MSHRC 077 for John Bowman as presented. Commissioner McFarland seconded. Vote 4-0.

Review and Approval of Minutes for 8/26/15, 10/14/15, 10/28/15, 11/4/15, 11/18/15 and 12/16/15

Commissioner Varney asked for a motion on the minutes for August 26, 2015; October 14, 2015; November 4, 2015; November 18, 2015 and December 16, 2015. Commissioner Reed made a motion to approve the minutes as previously stated. Commissioner McFarland seconded. Vote 2-0.

3. Adjudicatory Hearings:

a. RE: Robert Sumner, Preliminary Denial of 2016 Driver License Application

Mr. Sumner is appealing the decision of a Preliminary Denial of his 2016 application for licensing as a driver. Pursuant to 8 M.R.S. Section 283 a Preliminary Denial was imposed. Robert Sumner was present and represented himself. AAG, Guay qualified the Commissioners. The four Commissioners present stated that they do not have a personal or business relationship with Mr. Sumner and no to whether or not they have personal knowledge that would prevent them from being fair and unbiased in this case. AAG, Guay gave Mr. Sumner his oath. Mr. Jennings presented the following exhibits. Exhibit 1, 2016 Driver's License Application; Exhibit 2, Email from New York; Exhibit 3, USTA Rulings; Exhibit 4, Preliminary Denial from MSHRC and Exhibit 5, Title 8, Section 283. AAG, Guay asked Mr. Sumner if he objected to these exhibits. Mr. Sumner stated no. AAG, Guay admitted exhibits 1, 2, 4 and 5 but not exhibit 3. Mr. Jennings read Title 8, Section 283 into the record. Mr. Sumner testified. AAG, Guay asked for any closing remarks. Mr. Jennings asked if he could enter another exhibit. AAG, Guay admitted this exhibit as

Exhibit 6, New York Wagering Board Suspension. Mr. Sumner stated that the exhibit says revocation or suspension. AAG, Guay closed the hearing for deliberations. Commissioner Varney asked for a straw poll on provisional license. Commissioner Graham made a motion to grant Mr. Sumner a provisional license as long as he behaves himself and has no level 1 or level 2 violations. If he has a level 1 or level 2 violations, suspend immediately for one year period. Commissioner Reed seconded. Vote 4-0.

- b. **RE: Frank Petrelli, Complaint Number 2015 MSHRC 082.** Mr. Petrelli is alleged to have violated MSHRC Rules Chapter 7 and 11. Mr. Petrelli is the trainer of record for the horse “Onesportonly”. A blood sample obtained from Onesportonly following the Sixth Race at the Oxford Fair on September 19, 2015 disclosed the presence of Methocarbamol. AAG, Guay stated that Mr. Petrelli did not receive notice of hearing so this case will be continued.
- c. **RE: Michael Cayouette, Complaint Number 2015 MSHRC 089.** Mr. Cayouette is alleged to have violated MSHRC Rules Chapter 7 and 11. Mr. Cayouette is the trainer of record for the horse “Reagens Revenge”. A blood sample obtained from Reagens Revenge following the Fourth Race at the Farmington Fair on September 23, 2015 disclosed the presence of Cobalt. Michael Cayouette was present and represented himself. AAG, Guay gave Mr. Cayouette his oath. AAG, Guay qualified the Commissioners. He asked Mr. Cayouette if he stipulated to the being the trainer of record for the horse Reagens Revenge and that the horse raced at Farmington Fair in the fourth race on September 23, 2015. Mr. Cayouette stated yes. AAG, Guay asked Mr. Cayouette if he admits that the horse had cobalt in its system. Mr. Cayouette stated yes because of the testing. AAG, Guay asked Mr. Jennings for exhibits. Mr. Jennings presented the following exhibits. Exhibit 1, Notice of Hearing; Exhibit 2, 2016 Trainer License Application; Exhibit 3, Race Program; Exhibit 4, Notice of Positive Test; Exhibit 5, HR Sample Tag; Exhibit 6, Sample Shipment Sheet; Exhibit 7, LGC Lab Certificate of Analysis; Exhibit 8, University of Kentucky Final Report; Exhibit 9, Confirmation Test for DNA and Level and Exhibit 10, ARCI Guidelines for Cobalt. AAG, Guay admitted these exhibits without objection. Mr. Cayouette presented the following exhibits. Exhibit 1, June 14, 2016 Letter from Martha Smith, DVM; Exhibit 2, Report from UK 12/10/2015 and Exhibit 3, Report from UK 12/16/2015. AAG, Guay admitted these exhibits without objection from Mr. Jennings. Mr. Jennings stated that this case is like others. He also stated that the new version of Chapter 17 would be what the Commission would be looking at. He stated that the lab results in Exhibit 7 and 8 and the confirmation test in Exhibit 9 prove there is a violation. Cobalt at that level would be a violation of Chapter 11. Mr. Cayouette stated that he has never seen or used cobalt. There was a long period of time before he could do anything. He paid for a split sample and had DNA testing. It all came back with the result of positive. AAG, Guay asked if there were any more questions. Seeing none, he closed the hearing on whether or not a violation had occurred. Commissioner Varney asked for a motion. Commissioner Graham made a motion that Mr. Cayouette did violate his trainer responsibility. Commissioner McFarland seconded. Vote 4-0. AAG, Guay reopened the hearing on penalty. Mr. Jennings stated based on the substance found it would be a violation Category B under Chapter 17. This is Mr. Cayouette’s first violation. AAG, Guay asked if this would be considered mitigating circumstances. Mr. Cayouette stated that he paid \$500 for testing and DNA and couldn’t believe he got a positive test. AAG, Guay closed the hearing on the penalty phase. Commissioner Varney asked for a motion. Commissioner Graham made a motion to a 15 day suspension with all but 5 days suspended and a \$500 fine with all but \$100 suspended and return of the purse. Commissioner Reed seconded. Vote 4-0.

- d. **RE: Michael Cayouette, Complaint Number 2015 MSHRC 095.** Mr. Cayouette is alleged to have violated MSHRC Rules Chapter 7 and 11. Mr. Cayouette is the trainer of record for the horse "Ms Neutralize". A blood sample obtained from Ms Neutralize following the Fourth Race at Bangor Raceway on November 9, 2015 disclosed the presence of Flunixin. Michael Cayouette was present and represented himself. AAG, Guay qualified the Commissioners. He asked Mr. Cayouette if he stipulates to being the trainer of record of the horse Ms Neutralize and that the horse raced in the fourth race at Bangor Raceway on November 9, 2015, and that the horse had the presence of flunixin in its system. Mr. Cayouette stated yes to all of the above. Mr. Jennings presented the following exhibits. Exhibit 1, Notice of Hearing; Exhibit 2, Trainer License Application; Exhibit 3, Race Program; Exhibit 4, Notice of Positive Test; Exhibit 5, Sample Tag; Exhibit 6, Sample Shipment Sheet; Exhibit 7, LGC Lab Certificate of Analysis and Exhibit 8, ARCI Guidelines. AAG, Guay admitted these exhibits without objection. Mr. Jennings stated that this would be a first violation because it is a different category. They researched the matter and found it to be a second violation within 365 days. AAG, Guay gave Mr. Greenleaf his oath. Mr. Jennings asked Mr. Greenleaf if Mr. Cayouette had a previous violation. Mr. Greenleaf stated that Mr. Cayouette had a positive for flunixin on June 12, 2015 and he was given a written warning. Commissioner Graham asked what the level was on June 12, 2015. Mr. Greenleaf stated it would be between 20 and 100 because he received a written warning. AAG, Guay asked if the department has put out a recommended withdrawal guidelines for flunixin. Mr. Greenleaf stated not that he is aware of. Mr. Cayouette stated that he had seen a printed sheet but whether it was from the state or not, he wasn't sure. AAG, Guay asked if the warning that Mr. Greenleaf is referring to was an actual decision and order. Mr. Greenleaf stated he believes so. AAG, Guay stated that the reason he is asking is in order to be a second offense there would have to be a finding of a violation. Mr. Jennings stated yes to the best of his knowledge. AAG, Guay stated that the best practice tip would be to bring in the previous decision and order within a one year period. Commissioner Varney asked who has the list that we could give the trainers on how much time out you can give. Mr. Jennings stated that there are jurisdictions and organizations that publish withdrawal guidelines. The department and the commission very much intentionally are not in the business of publishing those types of recommendations for the simple reason that it would make the department and commission potentially accountable for violations if they follow those guidelines. Commissioner McFarland stated that one of the other factors is what other drugs and medications these horses are receiving, it may not metabolize at the same rate. That was clear when we had our discussion with Dr. Sams at the Calumet Club. You can't arbitrarily say look these are guidelines for 24 hours, 32 hours you should always weigh at the far end. There are too many horses racing back too soon. AAG, Guay stated that if there is no other evidence, the Commission can take notice of the minutes that were approved today for August 26, 2015 meeting; this reflects that there was an adjudicatory hearing regarding Mr. Cayouette complaint number 2015 MSHRC 037 and that there was a violation of flunixin relating to the first race on June 12, 2015 at Bangor Raceway. Commissioner Varney asked for any further discussion. Commissioner Varney made a motion to give Mr. Cayouette a written warning and a \$500 fine with \$250 suspended. Commissioner Graham seconded. Vote 4-0.
- e. **RE: Aaron Hall, Complaint Number 2016 MSHRC 01.** Mr. Hall is alleged to have violated MSHRC Rules Chapter 7 and 11. Mr. Hall is the trainer of record for the horse "Keemosabe". A blood sample obtained from Keemosabe following the Seventh Race at Scarborough Downs on March 26, 2016 disclosed the presence of Diclofenac. Aaron Hall was present and representing himself. AAG, Guay gave Mr. Hall his oath. He qualified the Commissioners. Commissioner McFarland recused himself from the hearing. AAG, Guay

asked Mr. Hall if he stipulates to being the trainer of record of the horse Keemosabe and that the horse raced in the seventh race on March 26, 2016 at Scarborough Downs and he admits that the horse had diclofenac in its system. Mr. Hall stated yes to all of the above. Mr. Jennings presented the following exhibits. Exhibit 1, Notice of Hearing; Exhibit 2, Trainer License Application; Exhibit 3, Race Program; Exhibit 4, Notice of Positive Test; Exhibit 5, Sample Tag; Exhibit 6, Sample Shipment Sheet; Exhibit 7, LGC Lab Certificate of Analysis and Exhibit 8, ARCI Guidelines. AAG, Guay stated that there was no objection to the exhibits being admitted. Mr. Jennings stated that this is the first medication case for a 2016 positive. As such the department is on record as saying that its policy for 2016 and going forward until some change has occurs in the context of penalty recommendations that the department is going to go with what the rule specifies because we believe that to be the purpose of the rule. We have diclofenac down as a Category C penalty because it is not one of the listed NSAIDS. The department recommends a minimum penalty of \$500 fine and the return of purse. AAG, Guay asked Mr. Hall if he had any statements. Mr. Hall stated that diclofenac is an anti-inflammatory that's in cream. He was not aware that it was in the cream that he used. Commissioner Varney stated that it doesn't list that drug. Mr. Jennings stated that the ARCI guidelines have it as Class C. AAG, Guay closed the hearing for deliberations. Commissioner Varney asked for a motion. Commissioner Graham made a motion for a penalty of \$500 with all but \$200 suspended and loss of purse. Commissioner Reed seconded. Vote 3-0.

4. Request for Relief from Licensees Not Included in the Cobalt Stay

AAG, Guay stated that there are a number of ways you can do this. You can do an actual motion for reconsideration in our rules. That has to happen within ten days of the decision and order and there are hurdles that you need to meet in order for the Commission to reconsider it. The other way is outside of the Commission to file an appeal. They have 30 days from receipt of the decision and order to file an appeal with Superior Court. What you have here today is unusual and most agencies don't consider these types of things and they limit the evaluation of these types of things to reconsideration or have a court above look at their decision. This would be like a business item. You can consider whether or not any type of relief should be given to them. What does that mean for procedure? There is no notice, there's no right to be heard except if the Commission wants to hear from both parties. That is up to you. Commissioner Varney asked if anyone wanted to make a motion. Commissioner Graham wanted to know if they have to make a motion to hear what they want to say. AAG, Guay asked Mr. Jennings what the bases was. Mr. Jennings stated that they had the two lowest cobalt numbers for which a penalty was issued. He thinks it was a question of fairness. He stated that he received a written request from Allison MacDonald to have this matter put onto the agenda. AAG, Guay stated that even if you hear what they want doesn't mean you even have to decide. Commissioner Varney stated that he would like to hear what they have to say. Mr. MacDonald addressed the Commission. He stated that he was eight points over the level for cobalt and the state vet said that he would not come before the Commission. He also stated that it isn't fair that they don't get a stay. Mr. Hiscock stated that he wished he had come under the old rule because this gentleman got 5 days and he got 90 days under the new rule. Mr. MacDonald stated that his level was lower than these gentlemen and they are out there racing. Commissioner Varney asked if they reduce their suspension how does it affect the case going through the courts. AAG, Guay stated that he can't predict what Mr. Childs or Mr. Rancourt could do with anything. AAG, Guay thinks though if he was asked by a judge, he could distinguish these gentlemen's cases from the other cases because of the levels. He would make the argument they made. He would repeat that to the judge. He stated that if you reduce the penalty it depends on what you're thinking is to do it. For example, he heard one argument here today that the penalty should be reduced because the cobalt case that was heard here today the guy got five days. If you were to adopt that kind of thinking he is not sure how every other cobalt case that came before it would not... He is not sure how to argue to a judge that if you do it based on the change of rules why other guys

wouldn't have the new rules applied to their cases. That would be a harder argument to make to a judge in his opinion. If you do suspend their time at this point, he thinks legally in terms of legal defense it's something that he could hear about in court. If you were to say the rules have changed and now the rules are more lenient for people who have cobalt violations. That would be a pretty strong argument for the other cases that they should have their cases lowered as well. If you were to use a rational like the Murchison case that case was well previously thought it was an A but now we think it's a B. Anybody else that would have had an A at that point, would have got a B. We, the Commission, think that the new penalty should apply to cobalt even the old cases and not the old penalties, then AAG, Guay thinks everybody else would get that relief. It would be pretty hard to argue to a court that they shouldn't. Commissioner Varney stated that if they suspend 30 days of their suspension that would mean that they had a 60 day suspension and what you would argue in court is not that they went by the new rule but that the Commission gave them 30 days. AAG, Guay stated that if you tell him that is what the Commission is doing, that is what he would do. Commissioner Varney stated that he happens to agree with Mr. MacDonald and Mr. Hiscock. He stated that he just saw a man get 5 days for the same thing that they got 90 days for. AAG, Guay asked than should all people who got 90 days and more get 5 days. Commissioner Varney stated that any of them that come in here and are still serving time that we should look at it which he isn't sure there are any. AAG, Guay stated which is not a decision that you are making here today but understanding what you are saying is you are inviting even the people who have stays to potentially come in and argue that in front of you. Commissioner Varney stated that he isn't going to argue that they get 5 days but these people got 90 days and they served 60 and suspend the rest. AAG, Guay stated just to be clear what you are saying than is there is no 10 days or 30 days that these other folks would also be able to come in and make the same argument to you. Commissioner Varney stated that the other people had multiple positives and higher positives. AAG, Guay stated that procedurally if you're saying that these other people would have the opportunity to come in like these gentlemen did and not saying that you're going to give them relief it's not only the gentleman who have filed an appeal. If you do that just understand that you have a handful and when he says that he is not arguing against it but his advice is if any one of these other people want to come in you will have to hear their argument. Commissioner Graham stated that he thinks they would be opening up a can of worms that they shouldn't be opening. Unfortunately, they came under the old rules and these are the new rules. If these were new rules, he would say there were mitigating circumstances in theirs too. Under the old rules it would be his feeling it should stand the way it is. Commissioner Reed agreed with Commissioner Graham that reopening that door is not something he would do. Commissioner McFarland also agreed with Commissioner Graham and Reed. He also apologized to Mr. Hiscock. Mr. Hiscock asked the Commission if they would give him a stay. He stated that if those guys go back to court and are found guilty he pays his money back and pays his fine. AAG, Guay stated that is another option, is that you would give a stay pending the decision of the other cases. Commissioner Varney asked the Commissioners if they give Mr. MacDonald and Mr. Hiscock a stay, and basically what they are saying is if they lose in court they are free and if they don't they will serve the rest of their time. AAG, Guay stated that they need to vote on it. Commissioner Varney asked for a motion to grant them a stay. AAG, Guay asked the Commission if they are doing the stay because of their particular facts or are you giving a stay because of these cases in superior court. There is a difference because if that's what you are doing then other people would also get the stay. The Department needs to know what you are doing. Commissioner Graham has a concern there too. Does that mean if Murchison, Switzer could come back? Commissioner Varney stated that if a stay is granted then their recourse would be to come in and ask for the same thing. AAG, Guay stated that it depends on how you word the stay and why you are giving the stay. Mr. Jennings stated that Mr. Murchison also contacted him by phone and asked if this was going to be put on the agenda, and he was wondering the same thing. AAG, Guay gave them legal advice that's kind of maybe skirting policy but it's hard to separate it when you are standing in front of a judge because the judge will ask legal questions; and sometimes the legal questions are grounded in what is called equity instead of law. The concept of equity is if the basis

that these gentlemen are going to have a stay is because the Commission recognizes that its decision may be overturned and wants to prevent harm to other people if they're found wrong. Obviously, you don't think you're wrong but if a judge says you know what, you're wrong and in fairness to the participants, the licensees understand that the judge has looked at the evidence so far and says you know what there is a probability that the Commission is going to lose; and there is reputable harm so the court has decided to put a stay there. If you're adopting the same view, we don't think we're wrong and granting a stay here whether it's for these gentlemen or all the people will not, he thinks, weaken the Commission's case. What it may show the court is the Commission is fair and the Commission is saying that these other people had money and they hired a lawyer who got a stay; the judges said we are looking at this stuff and we have a concern with this ruling and we understand it's a short season and people need to be able to race. If you give these gentlemen a stay it would be very difficult not to have everybody else to have a stay. Commissioner Varney stated that he is willing to take the gamble to give Murchison the same stay. AAG, Guay stated that would be his best advice and he thinks to the extent that the other side the people that are appealing this raised with the judge and he thinks it puts the Commission in good light that they are fair. Commissioner Varney asked the other Commission members if they agreed. Commissioner Graham made a motion to grant people with cobalt stays until the case is over in court. If they are found innocent then they are innocent and if they are guilty they will have to serve the rest of their time. Commissioner McFarland seconded. Vote 4-0.

5. Other Business

Mr. Jennings stated that Mr. Greenleaf will update the Commission regarding the testing. Mr. Greenleaf stated that the testing is ahead of schedule from what they were last year. When they receive the reports from the lab he is calling the trainers to let them know of any positive test. Commissioner Graham asked about the drivers and trainers that are appealing judges decisions. It seems to him that he has heard scuttlebutt that's the way you get out of not having to pay. You appeal and it sits there and eventually it goes away. Are we going to do something about that? Mr. Jennings stated that they keep a list of pending matters and now we are down to that. They have been held up for the judge. The judge has been unavailable all winter.

6. Public Comment

Commissioner Varney asked if there was any public comment. Mr. Higgins and Ms. Patterson represented the Maine Harness Horsemen's Association. Mr. Higgins presented a 2 page handout regarding the purse account. He stated that they have not had a contract with Scarborough Downs for a year and a half. He is asking the Commission to help the association to seek some information. Ms. Patterson handed out a folder with all the information from the racetracks regarding purse money. AAG, Guay stated that he didn't realize what the MHHA were asking for and this was not on the agenda. He asked that the information/handouts received from the MHHA should be handed back because this may or may not be an issue the Commission would take up before it. One of the qualifying questions he asked the Commission is "do you have any personal knowledge of any of the facts" and the MHHA is giving the Commission information that they can take home and read. The Commission would have to say yes they have personal knowledge outside of the hearing based on that information. If this is something you are asking the Commission to help, the Commission doesn't help, the Commission is judges. AAG, Guay stated that the Department investigates violations of the statute and the Department would issue a notice of hearing to Scarborough Downs; and they would come here. What we have right now is you are starting to get to the point with the detail. You have expressed your concern. This is vague enough that the Commissioners are ok right now. He thinks to be proper under the Administrative Procedures Act, and if in fact, there is something wrong and the Commission decides to do something about it; and we're not in court and have an appeal and then it's found that the four Commissioners were biased because they sat here and heard this information. If this is actionable by the Commission, and to your concerns you may be actually at this point putting yourself in a position where you aren't

going to be able to get the relief that you want. Mr. Higgins stated that he thought this was going to be put on the agenda but they weren't listed so he assumed that this is where they would be. AAG, Guay stated that the proper way to proceed would be to open up a matter before the Commission and he would be appointed as the hearing officer; and you could make discovery request and as the hearing officer he could rule on the discovery request, and put out orders for production of documents. AAG, Guay stated that he is concerned that this Commission at this point in time may put themselves in a position where they cannot act if it feels that it needs to act. This sounds like an adjudicatory matter verses public comment. Mr. Jennings stated that he has a request to reopen the race date hearing. He didn't realize that they needed to publish notice in the newspaper. AAG, Guay asked if they were reopening the race date hearing or the licensing. Mr. Jennings stated both. AAG, Guay stated that if they aren't related you might want to do them separate. You need to give reasonable time for a party to respond to discovery request. You need to put out a notice of hearing and that puts him on as hearing officer. You schedule a conference call; you make a discovery request; AAG, Guay writes an order; the order has to provide enough time to gather the information. The licensee is going to argue. If they are not providing the information now, there is no reason to believe they are going to all of a sudden agree to the information because there is a hearing. There will be argument on that and AAG, Guay will have to rule on that and then he will have to issue a decision and order. We will have to allow time for them to respond; if, he in fact grants the relief. That all takes time. Mr. Jennings stated that statutorily they have spent a lot of time analyzing what sort of authority the department has in terms of requesting information and it appears to him, it is limited. The state auditor has all the authority necessary to review the purse account. He asked the state auditor and they only take up what they want to take up. Commissioner McFarland asked if there might be a request to review the race dates. Mr. Jennings stated yes. He has had discussions with Scarborough Downs. AAG, Guay stated that as the Commissions lawyer that yes you can reopen their license and you can place conditions on a license.

Ms. Perkins wanted to know how many trotters there will be for Monday. She stated that there will be two races eight in one race and nine in the other.

7. Schedule of Future Meetings:

July 14 and 22, 2016
August 11, 2016
September 8, 2016
October 13 and 21, 2016
November 18, 2016
December 8, 2016

The Commission went into executive session to discuss litigation.

8. Adjourn

12:36 p.m.